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August 6, 2004

Ms. Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
Office of the Secretary
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551
Via e-mail (regs.comments@federal reserve.gov)

Office of the Comptroller of the Currency
250 E. Street, S.W.
Public Information Room
Mail Stop 1-5
Washington, D.C. 20219
Attention: Docket No. 04-14
Via e-mail (regs.comments@occ.treas.gov)

Re: Overdraft Protection Guidance

Dear Sir or Madam:

The member agencies of the Federal Financial Institutions Examination Council (the "Agencies") have published a request for comments on the Agencies Proposed Guidance on Overdraft Protection Programs ("Guidance"). The proposed Guidance is intended to assist depository institutions in the responsible disclosure and administration of overdraft protection services. JPMorgan Chase & Co., on behalf of its subsidiary banks JPMorgan Chase Bank, Bank One, NA (Columbus), and Bank One, NA (Chicago) appreciates the opportunity to submit this response.

JPMorgan Chase & Co. is a leading global financial services firm with assets of $1.1 trillion and operations in more than 50 countries. The firm is a leader in investment banking, financial services for consumers and businesses, financial transaction processing, asset and wealth management, and private equity. A component of the Dow Jones Industrial Average, JPMorgan Chase & Co. has its corporate headquarters in New York and its U.S. retail financial services and commercial banking headquarters in Chicago. Under the JPMorgan, Chase and Bank One brands, the firm serves millions of consumers in the United States and many of the world's most prominent corporate, institutional and government clients. Information about the firm is available on the Internet at www.jpmorganchase.com.

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General

As a general matter, distinctions must be drawn between overdraft programs that are expressly marketed and advertised as an account benefit and those that are not. The banking industry has long honored certain checks that create an inadvertent overdraft in a customer's account, as a convenience to the customer. These policies are generally not advertised or otherwise marketed to consumers. The decision whether or not to honor a check usually is based upon the bank's history with the customer, such as length of time the customer's account has been open, and the customer's average balances and frequency of overdrafts. Banks have engaged in this practice over the years, and have applied increasingly sophisticated software models to reduce associated risks.

Some depository institutions also offer a traditional overdraft line of credit, subject to credit review and approval. These lines of credit are subject to the Truth in Lending Act and Regulation Z, just like any other consumer line of credit. Institutions may also offer a program whereby deposit accounts are linked and funds are transferred automatically from a savings account to a checking account to avoid overdrafts. These programs do not involve an extension of credit and therefore do not present the same types of risk issues.

We strongly urge the Agencies to clarify that the Guidelines are designed only to apply to overdraft protection programs that are marketed or advertised to consumers ("Overdraft Protection Programs"), and not to services that simply honor certain checks as a convenience for customers, as described above.

Safety and Soundness

We agree that all depository institutions should have appropriate policies and procedures in place to address the operational and other risks associated with Overdraft Protection Programs.

The Guidance states that overdraft balances generated by Overdraft Protection Programs should generally be charged off within 30 days from the date of the overdraft. We respectfully disagree with a 30-day time period, and strongly encourage the Agencies to reconsider this guidance as this time frame is unreasonably short.

Depending on the timing of a customer's account cycle and when the overdraft occurs, a 30-day charge off requirement may not allow sufficient time for some customers to become aware of the overdraft and replenish their account. In addition, significant collections of overdrafts routinely occur beyond 30 days.

Generally, overdrafts are inadvertent rather than improper use of an account. In our experience approximately 45% of customers' accounts overdrawn for 30 days receive a deposit to eliminate the overdraft within 60 days from the date of the overdraft. A charge off after 30 days and the associated negative reporting to credit bureaus that ensues would result in an unintended adverse consequence to these customers, penalizing them for innocuous account behavior.

Legal Risks

The proposed Guidance states that Overdraft Protection Programs must comply with all applicable federal laws and state laws. The federal laws and regulations include Section 5 of the Federal Trade Commission Act, the Equal Credit Opportunity Act, the Truth in Lending Act, the Truth in Savings Act, and the Electronic Fund Transfer Act. In addition, Overdraft Protection Programs must comply with state laws, such as those dealing with usury, crime or unfair or deceptive acts or practices.

The Truth and Lending Act ("TILA") and Regulation Z require creditors to give cost disclosures in connection with extensions of consumer credit. We applaud the Agencies' affirmation in the proposed Guidance that overdraft fees are not finance charges under TILA and Regulation Z, provided the depository institution has not agreed in writing to pay overdrafts. We support the adoption of this portion of the proposed Guidance.

The Electronic Fund Transfer Act ("EFTA") and Regulation E require an institution to provide consumers with account-opening disclosures and to send periodic statements for months in which an electronic fund transfer ("EFT") has occurred and at least quarterly if no transfer has occurred.

The proposed Guidance states that if, under an Overdraft Protection Program, a consumer could overdraw an account by means of an ATM withdrawal or point-of-sale debit card transaction ("POS"), such transactions would be electronic fund transfers subject to EFTA and Regulation E. As such, periodic statements must be readily understandable and accurate regarding debits made, current balances, and fees charged. Terminal receipts also must be readily understandable and accurate regarding the amount of the transfer.

Depository institutions do provide fee information to consumers at account opening. However, depending on an individual institution's processing rules, it may not be possible to disclose accurately whether a particular transaction, at that time, will incur an overdraft fee. For example, some institutions do not assess fees if accounts are brought current before the end of the day, or may establish a cap or floor for fees to be assessed. Because of the programming complexity and expense required and the uncertainty as to whether any disclosed information will reflect the consumer's actual experience, disclosing whether a particular transaction will incur an overdraft fee should not be required.

We suggest that for proprietary ATM withdrawals, terminal receipts be required to show the amount withdrawn and the remaining balance of the account following the transaction. If the ending balance is overdrawn, this would be noted on the terminal receipt. The proposed Guidance should confirm that terminal receipts be accurate in relation to the amount of the transfer, but not be required to display associated fees.

With respect to POS transactions, the terminal is neither owned nor operated by the institution. Varying systems between merchants and institutions would preclude any further information (fees or balance) other than the specific amount of the purchase.

Best Practices
As stated above, the best practices contained in the proposed Guidance should only apply to those Overdraft Protection Programs that are advertised or marketed by depository institutions and not to discretionary services provided from time to time as a customer courtesy or accommodation. The suggested practices coincide with general advertising concepts ensuring that such advertisements are not misleading or deceptive.

Explain check clearing policies. This proposed practice suggests that institutions clearly disclose to consumers the order in which the institution pays checks or processes other transactions (e.g., transactions at the ATM or POS terminal). We strongly believe this practice should not be considered a best practice. The precise order in which checks and other items are paid can be highly technical and not easily explained to consumers. Institutions may consider a number of factors, including where the item was presented, whether the item was payable to the institution itself, the size of the item, or the item's serial number when determining payment order.

In addition, this proposed best practice is inconsistent with the Uniform Commercial Code, which recognizes that an institution should be allowed to process items in any order it chooses. The disclosure of the order of payment of items could create a contractual obligation between the consumer and the financial institution as the institution would be obligated to process items in that order. Subsequently, a bank's ability to change or modify such policies would be hampered. In order to change its check clearing policies, an institution would have to provide notice to its entire customer base. An institution should reserve and disclose its right to process items in any order it chooses and consumers should be encouraged to keep adequate available funds in their account to cover all authorized transactions regardless of the order in which presented.

Provide election or opt-out of service. This best practice states that "…where overdraft protection is automatically provided…" customers should be given the opportunity to opt out of the overdraft program. We presume that this opt out concept is intended to be limited to those Overdraft Protection Programs that are advertised or marketed by a depository institution. Otherwise, depository institutions that pay certain checks into overdraft on a discretionary basis as a convenience, would need to incorporate an opt out provision for a service that is not advertised and is not necessarily available. Arguably, by providing an opt out, the depository institution would be unintentionally advertising a practice for which advertising is unintended. Since this type of overdraft policy is intended for the benefit of the consumer when there is an occasional overdraft, an express opt out may unintentionally highlight this policy. As a result, a customer may believe there is a line of credit in place, thereby resulting in more frequent overdrafts and poor account management by the customer. This best practice, like the others, should only apply to Overdraft Protection Programs that are advertised or marketed.

JPMorgan Chase & Co. appreciates the opportunity to comment on this subject and would be pleased to discuss any of the points raised in this letter in more detail. Should you have any questions, please contact Lloyd Harris at 212-552-1785.

Sincerely,